No. 80-83

In the Supreme Court of the United States

OCTOBER TERM, 1980

EDMUND S. MUSKIE, SECRETARY OF STATE,
PETITIONER

v.

PHILIP AGEE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Whether the President, acting through the Secretary of State, has authority to revoke the passport of an American citizen whose international travel activities have caused and will continue to cause serious damage to the national security and foreign policy of the United States.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-91a) is reported at 629 F.2d 80. The opinion of the district court (Pet. App. 92a-99a) is reported at 483 F. Supp. 729. The administrative decision revoking respondent's passport (Pet. App. 119a-124a) is not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 100a-101a) was entered on June 27, 1980. The petition for a writ of certiorari was filed on July 18, 1980, and was granted on October 6, 1980 (J.A. 46). The jurisdiction of this Court rests on 28 U.S.C. 1254 (1).

STATUTE AND REGULATIONS INVOLVED

8 U.S.C. (Supp. II) 1185(b) provides:

> Except as otherwise provided by the President and subject to such limitations and exceptions as the President may authorize and prescribe, it shall be unlawful for any citizen of the United States to depart from or enter, or attempt to depart from or enter, the United States unless he bears a valid passport.

22 U.S.C. (& Supp. II) 211a provides:

> The Secretary of State may grant and issue passports, and cause passports to be granted, issued, and verified in foreign countries by diplomatic representatives of the United States, and by such consul generals, consuls, or vice consuls when in charge, as the Secretary of State may designate, and by the chief or other executive officer of the insular possessions of the United

States, under such rules as the President shall designate and prescribe for and on behalf of the United States, and no other person shall grant, issue, or verify such passports. Unless authorized by law, a passport may not be designated as restricted for travel to or for use in any country other than a country with which the United States is at war, where armed hostilities are in progress, or where there is imminent danger to the public health or the physical safety of United States travellers.

22 C.F.R. 51.70(b) provides:

A passport may be refused in any case in which:

* * * * *

(4) The Secretary determines that the national's activities abroad are causing or are likely to cause serious damage to the national security or the foreign policy of the United States

* * *

22 C.F.R. 51.71 provides:

A passport may be revoked, restricted or limited where:

(a) The national would not be entitled to issuance of a new passport under 51.70 * * *.

STATEMENT

1. Between 1957 and 1968, respondent, an American citizen, held a position of trust with the Central Intelligence Agency (Pet. App. 2a, 18a, 105a-106a, 113a-114a).[1] Upon entering on duty

[1] Respondent waived his right to an administrative hearing in this case and, in light of respondent's express concession that his international travel activities have caused and will

with the CIA, respondent pledged not to discuss or publish, without prior approval, "any information or material relating to the Agency, its activities or intelligence activities generally, either during or after the term of [his] employment * * *" (*Id.* at 18a, 106a). See *Agee* v. *CIA*, No. 79-2788 (D.D.C. Oct. 2, 1980) (reprinted at J.A. 39-45). See generally *Snepp* v. *United States*, 444 U.S. 507 (1980). During his tenure with the CIA, respondent received training in CIA clandestine operations, including the methodologies employed to provide cover for CIA employees and sources. He also served in undercover CIA assignments abroad and became personally acquainted with numerous other undercover CIA employees, many of whom are still active and whose association with the CIA has never been officially acknowledged (Pet. App. at 105a-106a, 113a-114a).

In 1974, respondent publicly announced a campaign to disrupt and destroy the CIA.[2] Since that time,

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continue to cause serious damage to the nation's security and foreign policy (see pages 5-6, *infra*), no evidentiary hearing was held in the district court. The statement of facts is thus derived from respondent's concessions in the district court and the essentially undisputed affidavits (but see note 5, *infra*) submitted by the government in the district court in support of its motion for summary judgment (Pet. App. 102a-103a) and its applications for a stay pending appeal (*id.* at 105a-127a).

[2] On October 3, 1974, respondent issued the following press release in London (Pet. App. 18a-19a):

> Today, I announced a new campaign to fight the United States CIA wherever it is operating. This campaign will have two main functions: First, to expose CIA officers and agents and to take the measures necessary to drive them out of the countries where they are operating;

respondent, who currently resides in the Federal Republic of Germany, has traveled abroad extensively, purporting to identify individuals within specific countries as CIA agents, employees, or sources. As respondent acknowledges (Pet. App. 17a-20a, 29a, 94a, 107a-112a), his activities and allegations have endangered the safety of many employees of the United States, whether or not they are connected to the CIA, and have caused serious damage to the national security and foreign policy of the United States. In particular, respondent's allegations about CIA operations are designed to force the expulsion of American employees from foreign countries and constitute a serious threat to the lives and safety of such employees (Pet. App. 19a-20a, 24a, 102a-103a, 107a, 111a-112a, 113a, 118a).[3]

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secondly, to seek within the United States to have the CIA abolished.

This effort to identify CIA people in foreign countries has been going on for sometime * * *. [Today's] list was compiled by a small group of Mexican comrades whom I trained to follow the comings and goings of CIA people before I left Mexico City.

Similar lists of CIA people in other countries are already being compiled and will be announced when appropriate. We invite participation in this campaign from all those who strive for social justice and national dignity.

[3] For example, on July 2, 1980, Louis Wolf, co-author with respondent of *Dirty Work: The CIA in Western Europe* (1978), held a press conference in Kingston, Jamaica, and named 15 persons as CIA agents in that country. The names and home addresses of these individuals were thereafter published in the local media. Within one week of Wolf's publicized announcement, two of the homes of the named individuals were subjected to violent, armed attacks (Pet. App. 125a-127a).

International travel has been and continues to be essential to respondent's avowed campaign against the CIA. His ability to travel abroad greatly enhances his potential to disrupt and damage American foreign policy and national security interests. Respondent is thus able to collect information that he needs to expose alleged CIA operations and employees; to find, recruit, and train individuals willing to assist in carrying out his program in various countries; to make personal contact with extremist groups; and to receive the type of intense local media coverage that he uses to incite hostile foreign groups to take action against American interests and personnel (Pet. App. 107a-112a, 113a-118a). See also note 3, *supra*.[4]

Recent events have further underscored the potential, if not actual, consequences of respondent's international travel activities. Citizens of various foreign countries, particularly Islamic nations, have demonstrated an increasing sensitivity to allegations that the United States has conducted or is conducting intelligence operations within their borders (Pet. App. 102a). Indeed, suspicions of CIA activity within Iran may have contributed to the anti-American feelings that led to the forcible takeover of the United States Embassy in Tehran in November 1979 and the continued imprisonment of more than 50 hostages by Iranian militants (*id.* at 21a-23a, 102a). Shortly after the embassy takeover, it was reported that respondent had been invited to travel to Iran to participate in a tribunal concerning the American hostages (*id.* at 103a, 116a-117a). Moreover, re-

[4] From time to time, various foreign governments, including Great Britain, France, Germany and Holland, have either deported respondent or refused him entry for security reasons (Pet. App. 18a).

spondent himself suggested that the Iranian militants should exchange the hostages for records of CIA intelligence operations in Iran, and he offered to assist the militants in analyzing any CIA documents that come into their possession (*id.* at 117a).[5]

Based on respondent's activities and in light of then-recent events in Iran, Pakistan, and Libya, the Secretary of State revoked respondent's passport on December 23, 1979 (Pet. App. 2a, 23a, 119a-124a). The letter revoking the passport stated that the Secretary's action was authorized by 22 C.F.R. 51.70 (b)(4) and 51.71(a), which provide that the Secretary of State may revoke a citizen's passport if his "activities abroad are causing or are likely to cause serious damage to the national security or the foreign policy of the United States." The letter to respondent further explained (Pet. App. 120a):

> Since the early 1970's it has been your stated intention to conduct a continuous campaign to disrupt the intelligence operations of the United States. In carrying out that campaign you have

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[5] With the one clarification described below, the affidavits filed by respondent in the district court and the court of appeals do not deny the facts stated in the affidavits submitted by the government in the courts below. Following revocation of his passport, respondent did state that he has no present intent to go to Iran while American hostages are still being held in that country. But respondent gave no assurances as to his possible future actions or intentions. Nor has respondent denied that he suggested that the militants exchange the hostages for CIA documents about Iran and that he offered to assist the militants in analyzing such documents. Furthermore, respondent does not deny that he is engaged in a campaign to expose clandestine CIA activities and undercover personnel and that his ability to travel internationally facilitates this campaign in the various ways detailed in the text.

> travelled in various countries (including, among others, Mexico, the United Kingdom, Denmark, Jamaica, Cuba, and Germany), and your activities in those countries have caused serious damage to the national security and foreign policy of the United States. Your stated intention to continue such activities threatens additional damage of the same kind.

The State Department also informed respondent of his right to a hearing under 22 C.F.R. 51.80 through 51.105 and offered to hold an expedited hearing in West Germany (Pet. App. 120a, 123a-124a).

2. Respondent waived his right to an administrative hearing and instead filed suit in the United States District Court for the District of Columbia (Pet. App. 93a). Respondent attacked the revocation of his passport on both statutory and constitutional grounds [6] and sought declaratory and injunctive relief from the Secretary's action. Both sides moved for summary judgment. For purposes of the summary judgment motions, respondent admitted that the allegations contained in the letter of revocation are true. That is, respondent expressly conceded that his "activities * * * have caused serious damage to the national security and foreign policy of the United States" and that his "stated intention to continue such activities threatens additional damage of the same kind" (*id.* at 4a, 94a, 120a).

On January 28, 1980, the district court declared 22 C.F.R. 51.70(b)(4) invalid and ordered the Sec-

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[6] In particular, respondent claimed that the Secretary's regulations were not authorized by Congress, that the Secretary could not revoke his passport without a prior hearing, and that the revocation violated his First and Fifth Amendment rights (Pet. App. 93a-94a).

retary to restore respondent's passport (Pet. App. 99a). The court observed that the right to travel internationally is constitutionally protected and that the Secretary may therefore revoke the passport of an American citizen only if "he acts pursuant to an explicit [congressional] delegation or * * * he has followed 'sufficiently substantial and consistent' administrative practice to warrant the implied approval of Congress" (*id.* at 95a, quoting *Zemel* v. *Rusk*, 381 U.S. 1, 12 (1965)). The court concluded that the Secretary failed to establish such a delegation or a settled administrative practice in the area of foreign affairs or national security, and it accordingly declared that the regulation had been promulgated without statutory authority (Pet. App. 95a-99a).[7]

3. On appeal, a divided panel of the court of appeals affirmed (Pet. App. 1a-91a). After reviewing this Court's decisions in *Kent* v. *Dulles*, 357 U.S. 116 (1958), and *Zemel* v. *Rusk*, *supra*, the court of appeals agreed with the district court that the Secretary's regulations are valid only if "Congress has authorized 22 C.F.R. § 51.70(b)(4) either by an express delegation or by a 'sufficiently substantial and consistent' administrative practice to warrant finding the implied approval of Congress" (Pet. App. 11a). The court of appeals held that the Passport Act of 1926, 22 U.S.C. 211a, does not explicitly authorize the revocation of a passport on national security or foreign policy grounds (Pet. App. 11a-13a). The court also concluded that the Executive's past administrative practice of denying and revoking passports

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[7] In view of this disposition, the district court did not address respondent's constitutional claims (Pet. App. 98a-99a).

to protect this country's national security and foreign policy interests was too insubstantial to "demonstrat[e] implied congressional authorization for the challenged regulation" (*id.* at 14a).[8] The court further observed that the Executive has authority to revoke respondent's passport if he were charged with a crime, but that no such formal allegation had been made (*id.* at 16a). The court therefore held the Secretary's regulations invalid, noting that "[w]e are bound by the law as we find it" (*ibid.*).

Judge MacKinnon dissented (Pet. App. 17a-91a), asserting that "[n]o United States Congress would ever intend to require a President to issue a passport to one with [respondent's] record and intentions" (*id.* at 17a). In a lengthy opinion, Judge MacKinnon traced the history of the Secretary's statutory authority and administrative practice regarding the denial and revocation of passports on national security and foreign policy grounds (*id.* at 30a-54a, 64a-68a). Judge MacKinnon concluded that, since at least 1856, the Secretary of State, in peacetime as well as war, had repeatedly denied and revoked passports on foreign policy and national security grounds and that Congress was fully aware of this consistent administrative practice (*id.* at 43a-52a). This historical record, in Judge MacKinnon's view, clearly constitutes a " 'sufficiently substantial and consistent administrative practice to warrant the implied approval of Congress.' *Zemel* v. *Rusk*, 381 U.S. at 12" (Pet. App. 52a).

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[8] The court explained that the Executive's authority "to restrict or condition the issuance of passports during time of war or national emergency [was] inapposite and unpersuasive on the issue of implicit authority to invoke national security or foreign policy considerations during peacetime" (Pet. App. 15a).

In addition, the dissenting opinion pointed out that in *Zemel* v. *Rusk*, *supra*, the Court upheld a blanket denial of passports to an entire geographical area on national security and foreign policy grounds and that (Pet. App. 34a-35a; emphasis in original):

> [t]he greater power to deny passports to all citizens for a limited area on such grounds necessarily includes the lesser power to deny a passport to an individual citizen *on the same grounds* where it is *conceded* that his *worldwide activities* have caused serious damage to our national security and foreign policy, and that his stated intention to continue such activities was "likely to cause" additional damage of the same character.

Finally, Judge MacKinnon distinguished *Kent* v. *Dulles*, *supra*, on which the majority had principally relied, on the ground that *Kent* concerned the Secretary's decision to deny passports merely because of the applicants' beliefs and ideology. Here, by contrast, respondent's *activities* abroad have caused and will continue to cause serious damage to the national security and foreign policy of the United States (Pet. App. 56a-57a) and involve arguably illegal conduct (*id.* at 56a-63a, 72a-91a).

SUMMARY OF ARGUMENT

I.

The court of appeals held that the Executive is without authority to revoke respondent's passport even though respondent concedes that his international travels are causing serious harm to the foreign policy and national security of the United States. The Passport Act of 1926 provides, however, that the "Secre-

tary of State *may* grant and issue passports * * * under such rules as the President shall designate and prescribe for and on behalf of the United States * * *." 22 U.S.C. 211a (emphasis supplied). The Act thus vests broad discretion in the Executive over the issuance and denial of passports. Moreover, although Congress has expressly limited the Secretary's discretion with regard to some kinds of passport restrictions, there is no such restriction for revocations predicated on foreign policy or national security considerations. The court of appeals' narrow construction of the Act is accordingly unwarranted.

Indeed, this Court has previously concluded that the sweeping language of the Passport Act empowers the Secretary to protect the national security and foreign policy of the United States. In *Zemel* v. *Rusk*, 381 U.S. 1, 8 (1965), the Court held that the "language [of the Act] is surely broad enough to authorize" the area restrictions that the Secretary had imposed on all passports in light of then recent international events. *Zemel* also makes clear that the Court's earlier decision in *Kent* v. *Dulles*, 357 U.S. 116 (1958), affords respondent no support. As the Court explained, "the issue * * * in *Kent* was whether a citizen could be denied a passport because of his political belief or associations." 381 U.S. at 13. Here, by contrast, respondent's passport unquestionably was revoked for reasons of foreign policy and national security based on his past and threatened future actions, not because of respondent's ideological beliefs or associations. Hence, *Zemel* rather than *Kent* suggests the correct result in this case.

In any event, the history of passport control in the United States overwhelmingly demonstrates that the Secretary may revoke a citizen's passport to protect

the nation's security and foreign policy. In fact, the revocation of respondent's passport is consistent with two hundred years of unequivocal and unbroken administrative practice. Prior to 1856, the Secretary exercised broad discretion over the denial and revocation of passports as a matter of the Executive's inherent authority to conduct foreign affairs and to ensure the country's safety. Both this Court and Congress approved that practice. In 1856, Congress enacted the first Passport Act in order to make clear that only the Secretary of State had jurisdiction to issue and deny passports. In accordance with the broad language of that statute and Congress' evident intent, the Secretary continued during this period to revoke and deny passports on national security and foreign policy grounds. Moreover, in enacting a travel control provision in 1918, Congress evidenced its agreement with, and approval of, the Secretary's longstanding construction of the Act.

In 1926, Congress reenacted the Passport Act and once again indicated its understanding of the Secretary's broad powers in this area. Under the current Act, the Secretary has continued to deny and revoke passports in order to protect the nation's defense and foreign relations. That administrative interpretation is entitled to particular deference, because Congress has been informed of the Secretary's position on numerous occasions and, although it has legislated with regard to passport control in 1941, 1952, and 1978, it has not sought to limit the Secretary's discretion regarding persons such as respondent. Indeed, in 1978, when Congress reconsidered and amended both the travel control provision and the Passport Act itself, it confirmed that the Executive may "control the departure of U.S. citizens to foreign countries

when such travel is inconsistent with a greater government interest." S. Rep. No. 95-842, 95th Cong., 2d Sess. 14 (1978).

In ignoring this historical background and interpreting the Passport Act grudgingly, the court of appeals' decision has impermissibly interfered with the Executive's ability to carry out its constitutional duties in the fields of foreign affairs and national security. The passport itself is an instrument of foreign policy, and the power to deny a passport to someone such as respondent may be critical to the nation's defense or foreign relations. Furthermore, where, as here, the Executive acts pursuant to both a legislative grant of broad authority regarding foreign affairs and its own inherent power in this area, the courts "should hesitate long before limiting or embarrassing such powers." *MacKenzie* v. *Hare*, 239 U.S. 299, 311 (1915). In sum, we submit that it is inconceivable that Congress intended to compel the Secretary to issue a passport to a person such as respondent, whose international travels have caused and will continue to cause serious damage to the vital interests of the United States.

II.

Respondent's constitutional claims, which were not addressed by the courts below, are plainly insubstantial. Although the right to travel abroad is "an aspect of the 'liberty' protected by the Due Process Clause," it is subject to reasonable governmental regulation. See, *e.g.*, *Califano* v. *Aznavorian*, 439 U.S. 170, 176-177 (1978). Here, the regulation in question satisfies due process, because it is directly related to the compelling governmental interests in protecting national security and foreign policy. See *Zemel* v.

Rusk, supra, 381 U.S. at 13-16. In addition, revocation of respondent's passport is justified by the government's "compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service." *Snepp* v. *United States*, 444 U.S. 507, 509 n.3 (1980).

Similarly, revocation of respondent's passport does not run afoul of the First Amendment. The regulation challenged here is directed on its face at the *conduct* of American citizens abroad and not protected speech. Moreover, to the extent that the regulation inhibits an individual's ability to communicate, it is well settled that the government may reasonably abridge the right of free speech to protect the national security. Finally, the regulation is not overbroad, because it is neutrally directed at proscribable conduct rather than speech and because it has been narrowly construed and applied. See, *e.g.*, *Parker* v. *Levy*, 417 U.S. 733, 760-761 (1974); *Broadrick* v. *Oklahoma*, 413 U.S. 601, 613-616 (1973).

ARGUMENT

This case presents the question whether the Executive may deny or revoke a passport to protect the foreign policy and national security of the United States. Although respondent concedes that his international travels have caused and will continue to cause serious damage to the nation's security and foreign relations, the court of appeals concluded that the Passport Act of 1926, 22 U.S.C. 211a, does not authorize the President, acting through the Secretary of State, to revoke respondent's passport. In the court of appeals' view (Pet. App. 11a-12a, 16a),

unless respondent has been indicted, the Executive is powerless to restrict respondent's travels abroad no matter how grave the danger to this country's security and no matter how great the interference with the President's conduct of foreign policy. Particularly since a passport is an instrument of foreign policy (see pages 22-23, 48-49, *infra*), that conclusion cannot be reconciled with the broad language of the Passport Act and the lengthy and consistent history of passport control based on foreign policy and national security grounds. See Point I, *infra*. Moreover, as we show in Point II, *infra*, respondent's constitutional claims regarding the revocation of his passport are insubstantial.[9]

I

THE PASSPORT ACT OF 1926 AUTHORIZES THE EXECUTIVE TO REVOKE A CITIZEN'S PASSPORT IN ORDER TO PROTECT THE NATIONAL SECURITY AND FOREIGN POLICY OF THE UNITED STATES

A. The Executive Has Broad Authority Under The Passport Act Regarding The Denial And Revocation Of Passports

The Passport Act of 1926 provides that the "Secretary of State *may* grant and issue passports * * *

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[9] Neither court below reached respondent's constitutional arguments, and this Court ordinarily would not address these questions in the first instance. See *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 163-164 (1975); *Combs* v. *United States*, 408 U.S. 224, 227 n.4 (1972). Because respondent has indicated that he will raise these issues as an alternative ground for affirmance (see Br. in Opp. 27 n.12) and because respondent's constitutional claims might otherwise affect the Court's construction of the Act (compare *Zemel* v. *Rusk*, 381 U.S. 1 (1965), with *Kent* v. *Dulles*, 357 U.S. 116 (1958)), we discuss these claims in Point II of our brief.

under such rules as the President shall designate and prescribe for and on behalf of the United States * * *." 22 U.S.C. 211a (emphasis supplied).[10] Pursuant to this broad authority, the Secretary of State has promulgated regulations concerning the denial and revocation of passports on national security and foreign policy grounds. 22 C.F.R. 51.70(b)(4) states that a passport will not be issued to an applicant if "[t]he Secretary determines that the national's activities abroad are causing or are likely to cause serious damage to the national security or the foreign policy of the United States."[11] 22 C.F.R. 51.71, in turn, authorizes the Secretary to revoke a passport in any circumstance in which the national would not be entitled to issuance of a new passport.[12]

Notwithstanding the expansive sweep of the Passport Act, the court of appeals has concluded that Congress intended to compel the Secretary to issue a passport to a citizen whose activities abroad would cause serious damage to the nation's security and for-

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[10] By Exec. Order No. 11295, 31 Fed. Reg. 10603 (1966), reprinted in 22 U.S.C. 211a note, the President has delegated to the Secretary of State the authority to designate and prescribe rules governing passports. 3 U.S.C. 301 permits such delegation.

[11] The current version of 22 C.F.R. 51.70(b)(4) was promulgated in 1968. 33 Fed. Reg. 5681 (1968). Since the earliest days of this country's history, the Executive has from time to time issued similar directives and has invoked the authority to deny passports on national security and foreign policy grounds. See pages 22-47, *infra*.

[12] In addition to the grounds at issue here, 22 C.F.R. 51.70 authorizes the Secretary to deny passports to fugitives, parole violators, incompetent persons, and individuals who have failed to pay repatriation loans. See also *Kent* v. *Dulles*, 357 U.S. 116, 127 (1958).

eign policy interests. Nothing in the broad language of Section 211a supports that remarkable conclusion. To the contrary, the Act clearly vests broad discretion in both the Secretary and the President regarding the issuance of passports. See *Andrus* v. *Idaho*, 445 U.S. 715, 726-727 (1980). Furthermore, as amended in 1978, Section 211a expressly limits the Secretary's authority solely with regard to area restrictions.[13] No such limitation appears with regard to the Secretary's power to deny passports to persons, such as respondent, whose travels are harming the national security and foreign policy of this country, and none should be lightly implied. See, *e.g.*, *Diamond* v. *Chakrabarty*, No. 79-136 (June 16, 1980), slip op. 4; *Andrus* v. *Glover Construction Co.*, No. 79-48 (May 27, 1980), slip op. 9; *Lewis* v. *United States*, 445 U.S. 55, 60 (1980); *National R.R. Passenger Corp.* v. *National Ass'n of R.R. Passengers*, 414 U.S. 453, 458 (1974).

This Court has previously recognized that the unrestricted language of the Passport Act gives the Executive substantial discretion with regard to the issuance and denial of passports. Thus, in *Zemel* v. *Rusk*, 381 U.S. 1 (1965), the Court held that Section

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[13] An area restriction is a limitation on the general public's right to travel to a particular country or geographical area. The Secretary's power to impose such restrictions was upheld by this Court in *Zemel* v. *Rusk*, 381 U.S. 1 (1965). In 1978, however, Congress amended Section 211a to permit the imposition of area restrictions only when the foreign country is at war with the United States or involved in armed hostilities, or "where [the locality presents] imminent danger to the public health or the physical safety of the United States travelers." Pub. L. No. 95-426, Title I, Section 124, 92 Stat. 971, codified at 22 U.S.C. (Supp. II) 211a. See pages 46-47, *infra*.

211a "embodies a grant of authority to the Executive to refuse to validate the passports of United States citizens for travel to [restricted areas]." 381 U.S. at 7. The Court observed that the Act's "language is surely broad enough to authorize area restrictions, and there is no legislative history indicating an intent to exclude such restrictions from the grant of authority." *Id.* at 8. Likewise, it is beyond dispute that Section 211a "is surely broad enough to authorize" the denial and revocation of respondent's passport pursuant to 22 C.F.R. 51.70(b)(4) and 51.71. See also *Perkins* v. *Elg*, 307 U.S. 325, 350 (1939); *Worthy* v. *Herter*, 270 F.2d 905, 912 (D.C. Cir.), cert. denied, 361 U.S. 918 (1959); *Developments in the Law—The National Security Interest and Civil Liberties*, 85 Harv. L. Rev. 1130, 1144-1145 n.50 (1972). Indeed, here, as in *Zemel*, the Secretary's imposition of travel restrictions on " 'persons whose travel may be regarded as [not] being in the best interest of the United States' " (381 U.S. at 3) is predicated on "the weightiest considerations of national security" "and foreign policy" (*id.* at 16, 13).

Kent v. *Dulles*, 357 U.S. 116 (1958), is not to the contrary. *Kent* did not concern the exercise of the Executive's authority to revoke a passport for reasons of foreign policy or national security. In fact, the passport applicants in *Kent* had not engaged in any "plainly harmful conduct" (*id.* at 126) and their travels abroad posed no " 'imminent danger to the public safety' " (*id.* at 128, quoting *Korematsu* v. *United States*, 323 U.S. 214, 218 (1944)). Rather, as the Court explained in *Zemel*, "the issue * * * in *Kent* was whether a citizen could be denied a passport

because of his political belief or associations." 381 U.S. at 13.[14]

Although the Court acknowledged in *Kent* that the Passport Act codified the Secretary's discretionary power regarding passports "in broad terms" (357 U.S. at 127), it nonetheless construed the statute to avoid the obviously difficult constitutional questions raised by the Secretary's actions in that case. See *id.* at 126-130.[15] Here, however, there is no similar justification for restricting the plain meaning of Section 211a. Because respondent has been denied a passport on national security and foreign policy grounds rather than ideological ones, his constitutional claims are insubstantial. See Point II, *infra; Huddleston* v. *United States*, 415 U.S. 814, 833 (1974). Moreover, as we now demonstrate, the history of passport control shows that, in contrast to the situation in *Kent*,[16] Congress contemplated that the Executive would revoke the passports of persons, such as respondent, whose travels abroad are inimical to the nation's security and foreign policy.

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[14] For the same reasons, the decision in *Dayton* v. *Dulles*, 357 U.S. 144 (1958), is inapposite.

[15] In *Aptheker* v. *Secretary of State*, 378 U.S. 500 (1964), the Court subsequently held that the Fifth Amendment precludes Congress from depriving citizens of their passports merely because of their membership in the Communist Party.

[16] The Court concluded in *Kent* that the legislative history did not evidence a congressional intent to deny passports simply on the basis of the applicant's Communist beliefs, and that the administrative practice regarding Communists was "scattered rulings and not consistently of one pattern." 357 U.S. at 128.

B. The History Of Passport Control Demonstrates That The Executive Has The Authority To Deny Or Revoke The Passport Of A Citizen Whose Travels Abroad Are Causing Harm To The National Security And Foreign Policy Of The United States

The Court has often remarked that "a statute come[s] 'freighted with the meaning imparted to [it] by the mischief to be remedied and by contemporaneous discussion. In such conditions history is a teacher that is not to be ignored.' " *St. Paul Fire & Marine Ins. Co.* v. *Barry*, 438 U.S. 531, 545-546 (1978), quoting *Duparquet Co.* v. *Evans*, 297 U.S. 216, 221 (1936). See, *e.g.*, *Andrus* v. *Idaho*, *supra*, 445 U.S. at 727; *Owen* v. *City of Independence*, 445 U.S. 622, 637 (1980). As the decisions in both *Kent* and *Zemel* indicate, that observation has particular relevance to the construction of the Passport Act. See 357 U.S. at 120-125, 128; 381 U.S. at 8-12, 17-18.[17]

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[17] In *Zemel*, the Court stated that "the 1926 Act must take its content from history" (381 U.S. at 17-18) and suggested that the Act does not constitute an unconstitutional delegation so long as it is construed to "authorize[ ] only those passport refusals and restrictions 'which it could fairly be argued were adopted by Congress in light of prior administrative practice' " (*id.* at 18, quoting *Kent* v. *Dulles*, *supra*, 357 U.S. at 128). Because the history of passport control legislation demonstrates that Congress intended to permit the Secretary to deny passports to persons such as respondent, this case affords no occasion for the Court to reconsider this dictum in *Zemel*. We note, however, that the Court elsewhere "has recognized that, in the area of foreign policy, Congress may leave the President with wide discretion that otherwise might run afoul of the nondelegation doctrine." *Goldwater* v. *Carter*, 444 U.S. 996, 1000 n.1 (1979) (Powell, J., concurring). See, *e.g.*, *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936).

Here, as in *Zemel*, both the historical administrative practice and the relevant legislative history strongly support the Secretary's position that passports may be revoked or denied to protect the nation's security and foreign policy. See Pet. App. 43a-52a, 64a-67a (MacKinnon, J., dissenting).

Because that history is both detailed and lengthy, we summarize at the outset the salient points. First, prior to the enactment of the original Passport Act in 1856, the Secretary, consistent with the view of both Congress and this Court, exercised broad discretion over the issuance and denial of passports as part of the Executive's constitutional responsibilities regarding foreign affairs and the national defense. In 1856, Congress codified the Executive's broad power in this regard, and during the next 70 years the Executive repeatedly, albeit judiciously, exercised its passport control authority on national security and foreign policy grounds. Then in 1918, Congress enacted a travel control statute that was predicated on the Secretary's authority to deny passports to citizens whose travels threatened the security and foreign policy of this country. Eight years later, Congress reenacted the Passport Act, and since that time, the Executive has continued to regulate passports on national security and foreign policy grounds.

Furthermore, as we show in Point I.C., *infra*, Congress must be deemed to have acquiesced in this 200-year old administrative practice. The Secretary has repeatedly informed Congress of its views on this matter and Congress has never acted to deprive the Secretary of the power to deny and revoke passports on national security and foreign policy grounds. Quite to the contrary, since 1926 Congress has on several occasions enacted and amended travel control legis-

lation whose efficacy is dependent in large measure on the Executive's broad passport control authority. In addition, Congress reconsidered and amended both the Passport Act and the related travel control provisions in 1978, and again evidenced its understanding of the Executive's broad powers in this area.

1. *The Early History*

For the first 80 years of this country's existence, Congress passed no law explicitly authorizing the Secretary of State to issue passports. Nonetheless, it was universally understood that passports are instruments of foreign policy and that in futherance of the Executive's constitutional duties regarding foreign affairs and national security (see United States Constitution Article II, Section 2, Clauses 1 and 2), the Secretary had broad discretion over the issuance and denial of passports. See, *e.g.*, 3 J. Moore, *International Law Digest* § 492, at 856-857; § 493, at 862-864; § 494; § 495, at 869-871; and § 512, at 919-920 (1906) (H.R. Doc. No. 551, 56th Cong., 2d Sess. (1906) (hereinafter "J. Moore"); Department of State, *The American Passport* 8-41, 82-87 (1898); 3 G. Hackworth, *Digest of International Law* § 261, 448 (1942) (hereinafter "G. Hackworth"); *Passports and the Right to Travel: A Study of Administrative Control of the Citizen*, 89th Cong., 2d Sess. 2-3 (Comm. Print 1966) ("Passports and the Right to Travel"); *The Right to Travel: Hearing Pursuant to S. Res. 49 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 85th Cong., 1st Sess. 59, 159-160 (1957); *Miller* v. *Sinjen*, 289 F. 388, 394-395 (8th Cir. 1923).[18] In *Urtetiqui*

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[18] The Secretary's exercise of this authority has its origins in the common law as well as the Constitution. It was well

v. *D'Arcy*, 34 U.S. (9 Pet.) 692 (1835), for example, this Court explained (*id.* at 699):

> There is no law of the United States, in any manner regulating the issuing of passports, or directing upon what evidence it may be done, or declaring their legal effect. It is understood, as matter of practice, that some evidence of citizenship is required, by the secretary of state, before issuing a passport. This, however, is entirely discretionary with him. * * * It is a document, which, from its nature and object, is addressed to foreign powers; purporting only to be a request, that the bearer of it may pass safely and freely; and is to be considered rather in the character of a political document, by which the bearer is recognized, in foreign countries, as an American citizen * * *.

From time to time during this period, Congress likewise recognized that the Secretary wielded broad discretionary powers regarding the issuance and denial of passports, particularly in the areas of foreign policy and national security. Thus, although Congress did not deem it necessary expressly to authorize the Secretary to issue and deny passports, it did ratify several treaties and enact statutes premised on the Secretary's power to do so. See, *e.g.*, Conven-

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established that, notwithstanding the common law right to travel (see *Kent* v. *Dulles*, *supra*, 357 U.S. at 125), the Crown could prevent a citizen from traveling abroad in order to protect the national security. For example, even in times of peace, the King could require archers and others who possessed special knowledge regarding the nation's defense to remain in the country. See 1 W. Blackstone, *Commentaries* *265-266*; 10 W. Holdsworth, *A History of English Law* 390-392 (1938); *Passports and the Right to Travel*, *supra*, at 1-2.

tion with the Swiss Confederation, Nov. 25, 1850, art. IV, 11 Stat. 589-590 (requiring American citizens visiting Switzerland to have passports); Act of Apr. 30, 1790, ch. 9, Section 28, 1 Stat. 118 (prohibiting violation of federal passports and certificates of safe-conduct); Act of Feb. 28, 1803, ch. 9, Section 8, 2 Stat. 205 (prohibiting State Department representatives abroad from knowingly issuing passports to aliens); Act of Mar. 1, 1855, ch. 133, Section 12, 10 Stat. 624 (eliminating fees for passports).

In 1815, for example, Congress made it unlawful for any citizen or resident "to cross the frontier into any province or territory belonging to the enemy * * * without a passport first obtained from the Secretary of State, the Secretary of War, or other officer * * * authorized by the President of the United States, to grant same * * *." Act of Feb. 4, 1815, ch. 31, Section 10, 3 Stat. 199. Congress also prohibited citizens from entering enemy camps or boarding enemy vessels without such a passport. See 3 Stat. 199-200. These measures were, of course, designed to protect the national security. In particular, Congress sought to preclude citizens from "smuggling * * * on the Northern frontier * * * in the course of which the enemy obtains important intelligence * * * and * * * essential supplies." 28 Annals of Congress 758 (1814) (remarks of Rep. Eppes). See also *id.* at 758-760; J. Moore, *supra*, § 532, at 1015-1016. Because the ready availability of federal passports for all citizens would obviously have defeated the purpose of this passport measure, it is apparent that as early as 1815 Congress contemplated that the Secretary could and would deny passports to persons whose travels across the border would threaten the national security of the United States.

2. *The Passport Act of 1856*

a. *The Statute.* Congress enacted the first Passport Act in 1856. Act of Aug. 18, 1856, ch. 127, Section 23, 11 Stat. 60-61. Much like the current Passport Act, this statute provided that the Secretary of State "shall be authorized to grant and issue passports * * * under such rules as the President shall designate and prescribe for and on behalf of the United States * * *." 11 Stat. 60.[19] Particularly in light of the well settled tradition regarding the sovereign's power to deny and revoke passports on national security and foreign policy grounds, " 'Congress would have specifically so provided had it wished to abolish' " that discretionary authority. See *Owen* v. *City of Independence, supra,* 445 U.S. at 637, quoting *Pierson* v. *Ray,* 386 U.S. 547, 555 (1967). See also, *e.g., Gooding* v. *United States,* 416 U.S. 430, 457-458 (1974); *Panama R.R.* v. *Johnson,* 264 U.S. 375, 384 (1924). To the contrary, however, the 1856 enactment on its face broadly codified the Executive's authority in this area.

The disruptive practice of many state and local officials of issuing passports and similar certificates gave rise to the 1856 statute. Congress sought to preclude such non-federal officials from interfering in the inherently federal function of passport control and thereby to centralize passport authority in the Executive Branch. See *Kent* v. *Dulles, supra,* 357 U.S. at 123; J. Moore, *supra,* § 493, at 862-864; *The*

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[19] In 1874, Congress amended the Act to provide that "[t]he Secretary of State may grant and issue passports * * * under such rules as the President shall designate and prescribe * * *." Rev. Stat. 4075. We are unaware of any relevant legislative history regarding this change in language. See also Act of May 30, 1866, ch. 102, 14 Stat. 54.

American Passport, supra, at 36-41; 8 M. Whiteman, *Digest of International Law* 225 (1967); 9 Op. Att'y Gen. 350, 352 (1859). There is absolutely no indication that at the same time Congress also intended to limit the Executive's existing power to refuse to issue passports to persons whose travels threatened the national security or foreign policy of the United States. Rather, Senator Mason, the sponsor of the Act, stated that "it was the intention of the bill to leave, all that pertains to the diplomatic service of the country * * * exclusively to the Executive, where we consider the Constitution has placed it." Cong. Globe, 34th Cong., 1st Sess. 1798 (1856). See also *id.* at 1797, 1798-1799; S. Rep. No. 209, 34th Cong., 1st Sess. 1 (1856).

b. *Executive implementation.* The Executive, and in particular the Secretary, immediately construed the original Passport Act as preserving its authority to deny passports on national security and foreign policy grounds. Thus, in 1861, Secretary of State Seward issued orders prohibiting all persons from going abroad, entering this country, or crossing into enemy territory unless they had first obtained a passport. See *The American Passport, supra*, at 49-54; J. Moore, *supra*, at 1015-1021. Citzens subject to military service (unless bonded) and persons "on errands hostile and injurious to the peace of the country and dangerous to the Union" were not entitled to a passport. *Id.* at 920. As a result of these regulations, the Executive repeatedly denied passports on national security grounds during the Civil War period. See *id.* at 1017-1020.

Furthermore, the Executive's unequivocal and consistent understanding that it could deny passports to protect the nation's vital interests was not limited

to wartime circumstances.[20] In 1901, Attorney General Knox, confirming an earlier opinion rendered by Attorney General Hoar (13 Op. Att'y Gen. 89, 92 (1869)), concluded that "a passport * * * may, in [the Secretary's] discretion, be granted or withheld." 23 Op. Att'y Gen. 509, 511 (1901). The Attorney General explained (*ibid.*);

> Substantial reasons exist for the use by Congress of the word "may" in connection with authority to issue passports. Circumstances are conceivable which would make it most inexpedient for the public interests for this country to grant a passport to a citizen of the United States. For example, if * * * an avowed anarchist * * * were to make such application, the public interests might require that his application be denied.

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[20] The court of appeals suggested (Pet. App. 15a) that the practice of revoking passports in wartime is "inappropriate and unpersuasive on the issue of implicit authority to invoke national security or foreign policy considerations during peacetime." We disagree. To be sure, the exigencies of wartime may justify limitations on personal freedom not permissible in peacetime. See, *e.g.*, *Korematsu* v. *United States*, 323 U.S. 214 (1944). But the issue in this case is whether the Passport Act of 1926 authorizes the Secretary to revoke a passport to protect the national security or foreign policy of the United States, and nothing in the language or legislative history of the Act suggests that the Secretary has greater discretion under the statute in wartime than in peacetime. Hence, in *Zemel*, this Court reviewed both peacetime and wartime practices in sustaining the peacetime practice challenged in that case. See 381 U.S. at 8-12. That the Secretary has perhaps invoked this power of revocation more often in wartime and other periods of national crisis is hardly surprising, since in those circumstances a citizen's travels abroad are more likely to trench upon foreign policy and national security concerns.

Similarly, in 1903, President Roosevelt promulgated a rule providing that "the Secretary of State has the right in his discretion to refuse to issue a passport, and will exercise this right towards anyone who, he has reason to believe, desires a passport to further an unlawful or improper purpose." J. Moore, *supra*, at 902; F. Van Dyne, *Citizenship of the United States* 257 (1904). See also Exec. Order No. 654 (June 13, 1907); Exec. Order No. 2119-A (Jan. 12, 1915); Exec. Order No. 2362-A (Apr. 17, 1916); Exec. Order No. 2519-A (Jan. 24, 1917). See also H.R. Doc. No. 326, 59th Cong., 2d Sess. 3-4, 7, 14 (1906); J. Moore, *supra*, §§ 512, 521; *The Right To Travel: Hearing Pursuant to S. Res. 49 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 85th Cong., 1st Sess., Pt. 2, 343-350 (1957).

The Secretary's construction of the Passport Act was not simply of academic importance, but was in fact applied in practice to deny passports to persons whose travels threatened substantial harm to the country's foreign policy or national security.[21] Although there are no systematic records on passport refusals, numerous peacetime instances in which passports were denied on national security and foreign

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[21] The Court's analysis in *Zemel* makes clear that Executive Orders and State Department rules and regulations, as well as individual passport denials, are part of the historical administrative practice that Congress may be deemed to have adopted over the years. See 381 U.S. at 8-12, 18. In fact, because Congress is more likely to be aware of Department regulations rather than particular rulings and because many persons might be dissuaded from seeking a passport if they were aware of their ineligibility, it makes little sense to focus only on actual instances of passport denials. Here, of course, both the regulations and rulings are consistently of one pattern.

policy grounds are well documented.[22] For example, in 1906, the Secretary denied a passport to a citizen who had gone to China and become a notorious promoter of gambling and prostitution, thereby embarrassing this country's relations with China. The Solicitor of the Department of State explained this action as follows (G. Hackworth, *supra*, at 498-499):

> The Secretary of State does not pose as a censor of morals, but if the moral character of the applicant is such as seemingly to involve the public interest or to reflect upon the good name of the United States, no reason is seen why the Secretary should not exercise his discretion in withholding the passport.
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> * * * *
>
> A passport is not merely evidence or prima facie evidence of citizenship. It is a request to a foreign government to permit the bearer of a passport "safely and freely to pass, and in case of need to give him or her all lawful aid and protection." In other words, the passport is a request for the good offices of the foreign government and in this respect is in a rough way equivalent to a letter of introduction.
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> It may well be that we may not care to give a letter of introduction and request good offices for a citizen of the United States whose conduct as evidenced by his past and present actions is likely to embarrass the United States. Such a case would seem to be a proper one for the

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[22] Because passport files are maintained by name rather than by category of applicant or reason for disposition, it is virtually impossible to compile comprehensive statistical data regarding passport denials on national security or foreign policy grounds.

Secretary to exercise his discretion and refuse the issue of a passport.

Moreover, in 1907, the Secretary declined to issue a new passport to Nelken Waldberg, an American citizen residing in Cairo, who "was engaged * * * in blackmailing projects, and *was disturbing or endeavoring to disturb the relations of this country with the representatives of foreign countries*" by libeling citizens and members of the diplomatic corps in Egypt. See G. Hackworth, *supra*, at 500-501 (emphasis supplied). See also C. Hyde, *International Law Chiefly as Interpreted and Applied by the United States* 1195 (1945); *The Right to Travel*, *supra*, at 167; Department of State, *Papers Relating to the Foreign Relations of the United States*, Pt. 2, 1076-1084 (1910). In connection with this episode, State Department officials reiterated the view that "the granting of a passport is a matter of discretion with the Secretary and not a matter of strict right," and that "[i]n the exercise of this discretion passports may be refused to persons * * * on high grounds of public policy." *Id.* at 1080-1083. Similarly, in 1917, the passport applications of several socialists were denied, because, contrary to American foreign policy interests and in apparent violation of the Logan Act, 18 U.S.C. 953, the applicants intended to participate in a quasi-official conference in Stockholm, Sweden. See E. Freund, *Administrative Powers Over Persons and Property: A Comparative Survey* 521 n.9 (1928). See also G. Hackworth, *supra*, at 504 (passport denied in 1921 for reasons of "international comity").

c. *1918 Travel Control Act.* In enacting the Travel Control Act in 1918, Congress confirmed that the Secretary, pursuant to his authority under the

original Passport Act, could revoke passports on national security and foreign policy grounds. Prior to the 1918 Act, no law required possession of a passport as a prerequisite to entering or leaving the United States, although, of course, the Secretary had broad discretion over the issuance of passports and such passports were often essential for safe travel abroad.[23] The 1918 Act provided that, upon Presidential wartime proclamation, "it shall, except as otherwise provided by the President * * *, be unlawful for any citizen * * * to depart from or enter * * * the United States unless he bears a valid passport." Act of May 22, 1918, ch. 81, Sections 1 and 2, 40 Stat. 559.

The 1918 travel control provision, which must be read in pari materia with the Passport Act (see, *e.g.*, *Roadway Express, Inc.* v. *Piper*, No. 79-701 (June 23, 1980), slip op. 7), was obviously designed to limit international travel by American citizens that was contrary to the public's overriding interest in national security. Because the 1918 Act does not authorize the Secretary to issue or deny passports, it would have failed in its purpose unless the Secretary had authority under the Passport Act to deny passports to persons such as respondent, whose travels abroad threatened the nation's security and foreign relations. In other words, if all citizens could obtain a passport for the asking, all could travel abroad regardless of the impact of their travels on national

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[23] See, *e.g.*, 56 Cong. Rec. 6029 (1918) (remarks of Rep. Flood). As explained above, Congress had previously imposed such travel control in 1815, but that law expired with the end of hostilities. See page 24, *supra*. Likewise, during the Civil War, the Executive had imposed a similar passport control requirement. See page 26, *supra*.

defense and foreign policy—a result clearly not intended by Congress.

The legislative history accompanying the 1918 Act reflects with clarity Congress' understanding on this point. Congress was primarily concerned with the possibility that "renegade Americans" might go abroad to "transfe[r] important military information." H.R. Rep. No. 485, 65th Cong., 2d Sess. 2 (1918). See 56 Cong. Rec. 6029-6030, 6067, 6195 (1918). Although such persons might not be prosecutable for a crime,[24] Congress plainly intended that the Department of State, which Congress expressly recognized was responsible for issuing passports, nonetheless would deny such persons the means to leave this country—that is, a passport. See H.R. Rep. No. 485, *supra*, at 2-3; 56 Cong. Rec. 6029-6031, 6063-6067 (1918). In sum, the purpose of the 1918 Act was "to give the executive departments of the Government power to control ingress to and egress from this country" (*id.* at 6029 (remarks of Rep. Flood)),[25] while preserving "the President['s] dis-

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[24] Congress specifically focused on the case "of a United States citizen who recently returned from Europe after having, to the knowledge of our Government, done work in a neutral country for the German Government. There was strong suspicion that he came to the United States for no proper purpose. Nevertheless not only was it impossible to exclude him but it would now be impossible to prevent him from leaving the country * * *. The known facts in his case are not sufficient to warrant the institution of a criminal prosecution, and in any event the difficulty of securing legal evidence from the place of his activities in Europe may easily be imagined." H.R. Rep. No. 485, *supra*, at 3.

[25] In his brief in opposition, respondent states that Representative Flood, the sponsor of the bill, "pointed out that the Secretary of State was not then authorized to revoke

cretion to say who shall or who shall not have passports" (*id.* at 6030 (remarks of Rep. Moore)).[26]

Following passage of the 1918 Act, the Executive proceeded to effectuate the legislative design by continuing the settled practice of denying passports to

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passports on national security grounds" and "specifically noted that the national security revocation authority claimed at that time was contrary to law, and could not be upheld" (Br. in Opp. 22 & n.8, 25 n.10, citing 56 Cong. Rec. 6066-6067 (1918)). The floor debate cited by respondent does not support these claims. Rather, Representative Flood stated only that Congress had not required an American citizen to have a passport as a prerequisite for entering or leaving the country and that, as a result, the Executive Branch rules and regulations regarding travel without a passport were inadequate and possibly invalid. See 56 Cong. Rec. 6066-6067 (1918).

Indeed, Representative Flood elsewhere explained that "the department issues some passports[, but] not all that are asked for" (56 Cong. Rec. 6031 (1918)), and that the Secretary should deny passports to "those whose loyalty is suspected, but there is not enough evidence to convict them in a court of justice" (*id.* at 6064). See also *id.* at 6063 (remarks of Rep. Huddleston) ("Now, a passport cannot be claimed by a citizen as a matter of right. Passports are granted only at the will of an administrative officer."); *id.* at 6246 (remarks of Sen. Townsend) (even before 1918 bill, "the administration * * * had been vested with discretionary power" regarding passports).

[26] In *Kent* v. *Dulles*, *supra*, the four dissenting Justices concluded that "[t]he legislative history of the 1918 Act sharply indicates that Congress meant the Secretary to deny passports to those whose travel abroad would be contrary to our national security." 357 U.S. at 132 (Clark, J., dissenting). The Court did not differ with that conclusion, but held only that there was no nexus between mere communistic beliefs and harm to national security. *Id.* at 128. Here, in contrast, respondent concedes that his international travels have caused and are causing substantial harm to the foreign policy and national security of the United States.

national security risks. See C. Hyde, *supra*, at 1196, 1204-1206. Indeed, the Presidential Proclamation triggering application of the Act prohibited issuance of a passport "unless it shall affirmatively appear that there are adequate reasons for such departure or entry and that such departure or entry is not prejudicial to the interests of the United States." Presidential Proc. of Aug. 8, 1918, Section 1, 40 Stat. 1831. And implementing regulations required the Secretary of State to submit every passport application to various intelligence agencies "for such information as said respective intelligence services may have available upon the applicant and for such comments as they desire to make." Department of State, *Control of Foreign Travel* (1918) (confidential instructions issued for guidance of officials connected with the administration of the Act of May 22, 1918).

3. *The Passport Act of 1926*

Eight years later and while the 1918 Act was still in force,[27] Congress recodified the Executive's broad authority over the issuance and denial of passports. Act of July 3, 1926, ch. 772, 44 Stat. 887. Because the Passport Act of 1926 adopts in haec verba the pertinent language of the prior passport statute, Congress must be presumed to have adopted the statute's longstanding administrative construction as well—at least in the absence of any compelling evidence of contrary congressional intent. See, *e.g.*, *Oscar Mayer & Co.* v. *Evans*, 441 U.S. 750, 756 (1979); *Lorillard* v. *Pons*, 434 U.S. 575, 580-581 (1978); *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 274-275

[27] The Presidential Proclamation triggering the Act's application during World War I expired in 1921. See 41 Stat. 1359. The Act itself, however, continued to authorize travel control limitations in case of war.

(1973); *Francis* v. *Southern Pacific Co.*, 333 U.S. 445, 450 (1948); *National Lead Co.* v. *United States*, 252 U.S. 140, 146-147 (1920). That presumption is fully apposite here.

First, Congress had only recently been reminded of the Secretary's long held view of his discretionary powers regarding the denial of passports on national security and foreign policy grounds, and had only recently enacted legislation based on that understanding. See H.R. Rep. No. 485, *supra*, at 2-3; 56 Cong. Rec. 6029-6030, 6063-6067 (1918). See also *Foreign Service of the United States: Hearings Before the House Comm. on Foreign Affairs*, 68th Cong., 1st Sess. 200-201 (1924). Moreover, the legislative history accompanying the 1926 Act, albeit sparse, emphasizes that Congress intended to facilitate the Secretary's discharge of his passport duties "without any risk of disadvantage to the Government." S. Rep. No. 1177, 69th Cong., 1st Sess. 2 (1926); H.R. Rep. No. 1358, 69th Cong., 1st Sess. 2 (1926). Indeed, the legislative hearings on the Passport Act of 1926 show that Congress was aware of the Secretary's broad discretion to deny passports to ineligible persons and that the Act was not intended to change prior practice. See *Validity of Passports: Hearings on H.R. 11947 Before the House Comm. on Foreign Affairs*, 69th Cong., 1st Sess. 2, 5, 8, 10, 11, 15, 21, 32-33 (1926).

C. The Court Of Appeals Erroneously Set Aside The Secretary's Longstanding Administrative Construction Of The Passport Act Of 1926

It is axiomatic that " 'the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong * * *.' " *E.I. du Pont de Nemours & Co.* v.

Collins, 432 U.S. 46, 54-55 (1977), quoting *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381 (1969). See, *e.g.*, *Ford Motor Credit Co.* v. *Milhollin*, 444 U.S. 555, 565 (1980); *Zemel* v. *Rusk*, *supra*, 381 U.S. at 11. Consistent with the language of the Passport Act of 1926 and the 150 years of passport control history canvassed above, the Secretary has repeatedly and unequivocally construed the Act as authorizing passport revocations based on foreign policy and national security considerations. See pages 36-40, *infra*. The court of appeals should have deferred to this administrative interpretation, because, as we now demonstrate, Congress has been informed of the Secretary's policies on numerous occasions and has repeatedly indicated its concurrent views on this point in the course of amending both the 1918 Travel Control Act and the Passport Act itself. See, *e.g.*, *Seatrain Shipbuilding Corp.* v. *Shell Oil Co.*, 444 U.S. 572, 595-596 (1980); *Board of Education* v. *Harris*, 444 U.S. 130, 148-149 (1979).

1. *Post-1926 Administrative Practice*

Following passage of the 1926 Act, the Executive not surprisingly continued both to assert and to exercise the power to deny and to revoke passports on national security and foreign policy grounds.[28] In an opinion rendered barely more than one month after the reenactment of the Passport Act, the Solicitor of the Department of State reiterated the Department's position that issuance of a passport is a discretionary act and that "the public interests for this

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[28] Likewise, the Executive from time to time imposed area restrictions on some or all passports in light of national security and foreign policy considerations. See, *e.g.*, *Zemel* v. *Rusk*, *supra*, 381 U.S. at 8-12.

country" might require denial of a passport to particular individuals. G. Hackworth, *supra*, at 467-468. In addition, Presidents Coolidge, Hoover and Roosevelt issued Executive Orders directing the Secretary to require satisfactory evidence from each passport applicant as to the purpose of his visit abroad and to deny such application if either the purpose of the visit or the evidence produced was unsatisfactory. See Exec. Order No. 4800 (Jan. 3, 1928); Exec. Order No. 5860 (June 22, 1932); Exec. Order No. 7856, 3 Fed. Reg. 687 (1938); 6 Fed. Reg. 5821, 6069, 6349 (1941); 7 Fed. Reg. 2590, 3708 (1942).

Pursuant to these Executive Orders and his authority under the Passport Act, the Secretary consistently concluded that no passport should be issued to a person whose foreign travel "activities are proved inimical to the United States." G. Hackworth, *supra*, at 499. For example, the 1930 consular regulations directed that passport applications be denied if the "applicant intends to commit crime or otherwise to bring grave discredit on the United States as * * * a political adventurer desiring or intending to take part in the political or military affairs of a foreign government in ways which would be contrary to the policy or inimical to the welfare of the United States * * *." *Id* at 501. Similarly, the Passport Division Office Instructions of July 30, 1937, Department of State, *Abstract of Passport Laws and Precedents* § 7.22 (1942), provided that passports not be issued to persons "guilty of disloyal acts, * * * bring-[ing] grave discredit to this country[, or] go[ing] abroad to take part in the political or military affairs of foreign countries in ways which would be contrary to the policy or inimical to the welfare of the United States."

Thereafter, during World War II, the Department exercised its passport authority "to remove passports from the hands of persons engaged in activities not in the best interest of the United States." Stuart, *Safeguarding The State Through Passport Control*, 12 Dep't State Bull. 1066, 1068 (1945). See also 6 Fed. Reg. 5821, 6069, 6349 (1941); 7 Fed. Reg. 2590, 3708 (1942); *The Right to Travel: Hearing Pursuant to S. Res. 49 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 85th Cong., 1st Sess. 197-200 (1957). And immediately following the war, the Department resumed its peacetime policy of denying passports to persons whose activities are "inimical to the best interests of the United States or detrimental to international harmony and understanding." Foreign Service, Ser. No. 747 (Aug. 7, 1947). See, *e.g.*, 13 Dep't State Bull. 897 (Dec. 2, 1945); 17 Fed. Reg. 8013 (1952); 26 Dep't State Bull. 919 (June 9, 1952); United States Passport Office, *Abstract of Passport Laws and Precedents* § 7.21 (1956). In 1956, for example, the Secretary issued a regulation concerning the denial of a passport in any circumstance in which the applicant's travel abroad would be "prejudicial to the orderly conduct of foreign relations * * * or prejudicial to the interests of the United States." 21 Fed. Reg. 336 (1956). The current version of the Secretary's policy (22 C.F.R. 51.70(b)(4) and 51.71) was promulgated in 1968. See 33 Fed. Reg. 5681 (1968).[29]

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[29] These regulations did not escape congressional notice. See pages 39-40, *infra*. Thus, a 1960 congressional staff report concluded that "the authority to issue or withhold passports has, by precedent and law, been vested in the Secretary of State as a part of his responsibility to protect American citizens traveling abroad, and what he considered

Moreover, although there are no comprehensive compilations regarding passport revocations and denials under the 1926 Act, the revocation of respondent's passport is hardly unprecedented as a matter of actual practice. For example, in 1948, the Secretary denied Representative Isacson's request for a passport, because the congressman sought to attend a foreign conference in support of an ongoing Greek rebellion that this country was then opposing. See *N.Y. Times*, April 11, 1948, § E, at 9. Similarly, the Secretary revoked Col. Hubert Julian's passport in 1954, because his gun running activities abroad, although not illegal, were considered to be prejudicial to the interests of the United States. See *Developments in the Law—The National Security Interest and Civil Liberties*, *supra*, 85 Harv. L. Rev. at 1150-1151 n.76. More recently, in 1970, the passports of two persons were revoked in light of their intent to travel to the site of an international airplane hijacking. See *Sirhan* v. *Rogers*, No. 79-3865 (S.D.N.Y. Sept. 11, 1970), aff'd mem., No. 35364 (2d Cir. Oct. 5, 1970) (denying plaintiffs' request for injunctive relief). In addition, the State Department has submitted statistics to Congress on several occasions showing that the Secretary has repeatedly revoked

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to be the best interests of the Nation." *Reorganization of the Passport Functions of the Department of State, Staff Report on S.2095 of the Senate Comm. on Government Operations*, 86th Cong., 2d Sess. 13 (1960). See also *Proposed Travel Controls: Hearings on S. 3243 Before the Subcomm. to Investigate the Administration of the Internal Security Act and Other Internal Security Laws of the Senate Comm. on the Judiciary*, 89th Cong., 2d Sess. 72 (1966); *Report of the President's Commission on the Assassination of President John F. Kennedy* 773-778 (1964) (the Warren Commission Report).

passports or denied passport applications on national security or foreign policy grounds.[30] In short, the Secretary's action here is consistent with two hundred years of passport practice.

2. *Post-1926 Legislative Developments*

a. The enactment of various travel control measures since 1926 evidences Congress' agreement that the Secretary has power under the Passport Act of 1926 to deny and revoke passports on national security and foreign policy grounds. In 1941, Congress amended the 1918 Travel Control Act in order to increase "the centralization of control over the entry into and departure from the United States of persons

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[30] In 1955, the Secretary revoked or denied at least six passports because the activities abroad of the person in question were deemed harmful to our foreign policy. One of these applicants "had participated in the local political affairs of a friendly foreign power, had been the source of complaint by the friendly power, and by his behavior had become an internal problem to the friendly power." *Department of State Passport Policies: Hearings Before the Senate Comm. on Foreign Relations*, 85th Cong., 1st Sess. 74 (1957); *The Right to Travel: Hearing Pursuant to S. Res. 49 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary* 128, 85th Cong., 1st Sess. (1957). See, *e.g.*, *id.* at 73-130 (collecting statistics on foreign policy and national security cases); *Passport Legislation: Hearings on S. 2770, S. 3998, S. 4110, and S. 4137 Before the Senate Comm. on Foreign Relations*, 85th Cong., 2d Sess. 30, 40 (1958) (at least 57 passports revoked or denied in 1956 because passport holder had engaged in either "illegal activities or activities prejudicial to the orderly conduct of foreign relations"); *U.S. Passports Denial and Review: Hearings on H.R. 9991 Before Subcomm. No. 1 of the House Comm. on the Judiciary*, 84th Cong., 2d Sess. 12-13 (1956); Note, *Passport Refusals for Political Reasons: Constitutional Issues and Judicial Review*, 61 Yale L.J. 170, 174-178 (1952).

of all classes." S. Rep. No. 444, 77th Cong., 1st Sess. 2 (1941). Whereas the 1918 Act was applicable only in time of war, Congress now authorized the President to make possession of a passport a prerequisite for international travel during the national emergency declared by the President on May 27, 1941. See Act of June 21, 1941, ch. 210, Section 1, 55 Stat. 252-253; S. Rep. No. 444, *supra*, at 1-2; H.R. Rep. No. 754, 77th Cong., 1st Sess. 2 (1941). The Act was thus designed to promote "as far as possible the national defense" by permitting the Executive to stop the foreign travels of American citizens "who are directly engaged in espionage and subversive activities in the interests of foreign government * * * [or who] are engaged in activities inimical to the best interests of the United States." S. Rep. No. 444, *supra*, at 1-2. See 87 Cong. Rec. 5048-5052 (1941).

Subsequently, in April 1952, Congress extended the prohibition on travel without a passport for a one-year period in order "to insure the national security." Act of Apr. 14, 1952, ch. 204, Section 1(a)(40), 66 Stat. 54-57. Shortly thereafter, in June 1952, Congress enacted a new travel control provision that authorized the President to impose passport requirements on American travelers during any war or national emergency declared by the President. Immigration and Nationality Act of 1952, ch. 477, Section 215(b), 66 Stat. 190, codified at 8 U.S.C. (1970 ed.) 1185(b). See S. Rep. No. 1137, 82d Cong., 2d Sess. 14 (1952); H.R. Rep. No. 1365, 82d Cong., 2d Sess. 53 (1952). At the same time, Congress created a Passport Office within the Department of State and instructed the Director of that office "to maintain direct and continuous liaison with the Directors of the Federal Bureau of Investigation and Central In-

telligence Agency * * * for the purpose of obtaining and exchanging information for use in enforcing the provisions of this Act in the interest of the internal security of the United States." Immigration and Nationality Act of 1952, ch. 477, Sections 104-105, 66 Stat. 175, codified at 8 U.S.C. (1970 ed.) 1105. See S. Rep. No. 2231, 81st Cong., 2d Sess. 1-2 (1950); S. Rep. No. 1137, *supra*, at 8; H.R. Rep. No. 1365, *supra*, at 36.

It is thus apparent that Congress contemplated that citizens whose travels abroad would harm the national security or foreign policy of the United States would not be entitled to a passport. And because the travel control provisions of the 1941 and 1952 statutes, like the 1918 Act, did not themselves authorize the Secretary to deny or revoke passports on national security or any other grounds, Congress must have assumed that the Passport Act of 1926 had already vested such discretion in the Executive. The court of appeals' contrary conclusion regarding the Secretary's powers under the Passport Act means that the 1941 and 1952 travel control legislation failed in their central purpose—a wholly untenable result. See, *e.g.*, *Mercantile National Bank* v. *Langdeau*, 371 U.S. 555, 560 (1963).

b. In the late 1950's, Congress again considered legislation regarding passport control. Although no statute was enacted or amended at that time, the legislative history demonstrates once more that Congress was aware of the Secretary's practice in this area and made no attempt to limit his authority. At all events, there is no support for respondent's contentions (Br. in Opp. 20-21 n.7, 26) that Congress expressly sought to deny the Secretary the discretion to protect the national security and foreign policy or

that the Department of State acknowledged its lack of authority in that regard.

In 1956, for example, a State Department official informing Congress about the number of passports revoked on foreign policy and national security grounds testified that "there are over 150 years of precedent in our country on this question of denying our citizens * * * who would interfere with [the Secretary's] obligations in carrying out our foreign policy, an American passport." *U.S. Passport Denial and Review: Hearings on H.R. 9991 Before Subcomm. No. 1 of the House Judiciary Comm.*, 84th Cong., 2d Sess. 12-13 (1956). See also *id.* at 2, 4-5, 7-8. Similarly, the next year, the Department again informed Congress about its regulations (including the predecessor version of 22 C.F.R. 51.70(b)(4)), interpretations, and historical practice of denying passports to persons "who were taking acts contrary to the policy of the United States." *The Right to Travel: Hearing pursuant to S. Res. 49 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 85th Cong., 1st Sess. 60 (1957). See *id.* at 59-60, 69-75, 87, 97, 100-101, 109-112, 128-219, 229, 248-249, 263-264, 266, 270-271, 273, 275-277, 309-311, 323, 328, 341-342, 343, 346-350, 379; *Department of State Passport Policies: Hearings Before the Senate Foreign Relations Comm.*, 85th Cong., 1st Sess. 2-3, 8-10, 38-40, 59-60, 63, 74, 79-80, 84 (1957). In addition, members of the various congressional committees expressed their understanding that the Secretary had power under the Passport Act of 1926 to revoke and deny passports in order to protect the national security and foreign policy. See *The Right to Travel*,

supra, at 69, 75, 87 (remarks of Sens. Hruska and O'Mahoney); *Department of States Passport Policies*, *supra*, at 9-10, 92, 113 (remarks of Sens. Fulbright, Green, and Capehart).[31]

Thereafter, following the Court's decision in *Kent*, the Executive Branch sought congressional clarification of its authority in this area. In a message to Congress, President Eisenhower noted that the Secretary of State had traditionally exercised his discretion to refuse passports where the applicant's travel would be "inimical to United States foreign relations" (H.R. Rep. No. 2684, 85th Cong., 2d Sess. 2 (1958)), and he urged that Congress pass legislation overruling the *Kent* decision insofar as it precluded the denial of passports to Communists (*id.* at 2-3). Neither the administration's proposed legislation nor any other draft bills concerning passport control and travel by Communists were enacted at that time.

We submit that no adverse inference about the Secretary's passport power may be drawn from this sequence of events. First, it is well settled that the Executive does not "admit[] that it is acting upon a wrong construction by seeking ratification from Congress." *Wong Yang Sung* v. *McGrath*, 339 U.S. 33, 47 (1950). See, *e.g.*, *FTC* v. *Dean Foods Co.*, 384 U.S. 597, 608-611 (1966); *United States* v. *Wise*, 370 U.S. 405, 411 (1962). Furthermore the legislative hearings and debates focused almost exclusively

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[31] Other witnesses echoed this understanding. For example, a spokesman for the American Civil Liberties Union testified that the ACLU "supports the propriety of denying a passport where the State Department has substantial evidence that the applicant is going abroad to engage in subversive activity against the United States." *Department of State Passport Policies, supra*, at 136. See *id.* at 136-137.

on the preceived problem of the worldwide Communist conspiracy and on overruling *Kent*, not on the distinct question posed by this case. See generally *Denial of Passports to Persons Knowingly Engaged in Activities Intended to Further the International Communist Movement: Hearings on H.R. 13760 Before the House Comm. on Foreign Affairs*, 85th Cong., 2d Sess. (1958) ("*Denial of Passports*"); *Passport Legislation: Hearings on S. 2770, S. 3998, S. 4110, and S. 4137 Before the Senate Comm. on Foreign Relations*, 85th Cong., 2d Sess. (1958) ("*Passport Legislation I*"); *Passport Legislation: Hearings on S. 806, S. 1973, S. 2287, and S. 2315 Before the Senate Comm. on Foreign Relations*, 86th Cong., 1st Sess. (1959) ("*Passport Legislation II*"); *Providing Standards for the Issuance of Passports and for Other Purposes: Hearings on H.R. 9069 Before the House Comm. on Foreign Affairs*, 86th Cong., 1st Sess. (1959); 104 Cong. Rec. 19654-19658 (1958).

More important, insofar as Congress considered the Secretary's power to revoke and deny passports on national security and foreign policy grounds, it apparently approved the established administrative construction. Contrary to respondent's contention (Br. in Opp. 20-21 n.7), State Department representatives uniformly testified before Congress that "the Secretary and the President actually have th[e] power [to deny passports on foreign policy and national security grounds] right now," and that that power was "not in any way affected by the Supreme Court's decision [in *Kent*]." *Denial of Passports*, *supra*, at 7. See, *e.g.*, *id.* at 32, 63; *The Right to Travel*, *supra*, at 379; *Passport Legislation I*, *supra*, at 23, 41; *Providing Standards for the Issuance of Passports*, *supra*, at 8, 178; *Passport Legislation II*,

supra, at 59, 62. Although Congress was thus fully aware of the Secretary's view, it nonetheless declined to enact proposed legislation that would have severely limited the Executive's authority regarding the denial and revocation of passports on foreign policy and national security grounds. See, *e.g.*, H.R. 13652, 85th Cong., 2d Sess. (1958); S. 806 and S. 2095, 86th Cong., 1st Sess. (1959); *Passport Legislation II*, *supra*, at 3-6; *Denial of Passports*, *supra*, at 94-97; *The Passport Reorganization Act of 1959: Hearings on S. 2095 Before a Special Subcomm. of the Senate Comm. on Government Operations*, 86th Cong., 1st Sess. 3-7, 11-12 (1959).

3. *1978 Amendments*

In 1978, Congress again "revisited the Act and left the [Secretary's] practice untouched." *Saxbe* v. *Bustos*, 419 U.S. 65, 74 (1974). See, *e.g.*, *Andrus* v. *Allard*, 444 U.S. 51, 57 (1979); *Board of Governors* v. *First Lincolnwood Corp.*, 439 U.S. 234, 248 (1978). Section 707(b) of the Foreign Relations Authorization Act, Fiscal Year 1979, establishes that, except as otherwise provided by the Executive, all American citizens must have a passport while entering or departing the United States. See Pub. L. No. 95-426, Section 707(b), 92 Stat. 993, codified at 8 U.S.C. (Supp. II) 1185(b). Previously, as we have noted above, the passport requirement was applicable only in times of war or national emergency. See page 41, *supra*.[32]

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[32] The decision to enact the passport requirement on a permanent, non-emergency basis was an outgrowth of a comprehensive congressional review of all legislation governing Executive authority in time of national emergency. In 1976, Congress determined that most emergency powers, in-

At the same time, Congress amended the Passport Act itself to limit the circumstances in which the Secretary may impose area restrictions. But Congress did not otherwise restrict the Secretary's broad powers under the Act. To the contrary, the Senate Report accompanying the 1978 amendments makes clear that Congress intended to preserve the Secretary's authority to deny and revoke passports to protect the national security and foreign policy of the United States. "The committee recognizes clearly that the passport authority should not be restricted in any way which would limit the President's ability to control the departure of U.S. citizens to foreign countries when such travel is inconsistent with a greater government interest * * *." S. Rep. No. 95-842, 95th Cong., 2d Sess. 14 (1978).

In sum, Congress has been fully informed of and has acquiesced in the Secretary's longstanding view of the Act. Accordingly, the court of appeals erroneously concluded that the Executive is without power to revoke or deny a passport in order to protect the vital interests of this country.

D. The Decision Below Substantially Interferes With The Executive's Ability To Conduct Foreign Affairs And To Protect The National Security

Although the primary issue in this case concerns the construction of a statute, the controversy arises

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cluding travel control, should be terminated as of September 14, 1978. See National Emergencies Act, Pub. L. No. 94-412, Section 101, 90 Stat. 1255. But, as indicated above, in 1978, just as the emergency period was expiring, Congress agreed to continue the passport requirement at all times, thus further demonstrating that the Secretary's passport authority is not based on the existence of a war or other national emergency.

in the context of the Executive's constitutional responsibilities in the fields of foreign affairs and national defense. The Executive wields "very delicate, plenary, and exclusive power" over the country's foreign affairs and has been described by this Court as the "sole organ of the federal government in the field of international relations." *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936). See United States Constitution Article II, Section 3, Clause 2; *Goldwater* v. *Carter*, 444 U.S. 996 (1979); *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398 (1964); *United States* v. *Pink*, 315 U.S. 207, 222-223 (1942). In addition, the President, as the Commander-in-Chief, has ultimate responsibility for the preservation of the nation's security. See United States Constitution Article II, Section 2, Clause 1; *United States* v. *Reynolds*, 345 U.S. 1, 10 (1953); *Chicago & Southern Air Lines, Inc.* v. *Waterman S.S. Corp.*, 333 U.S. 103, 109-112 (1948). And, of particular relevance to this case, the Executive has statutory duties, as well as inherent responsibilities, "to obtain or effectuate the release" of "any citizen * * * unjustly deprived of his liberty by or under the authority of any foreign government" (22 U.S.C. 1732) and to "protec[t] intelligence sources and methods from unauthorized disclosure" (50 U.S.C. 403(d)(3)).

The Executive's exercise of discretion pursuant to the Passport Act is directly related to those powers and responsibilities. Indeed, the passport itself is an instrument of diplomacy "in effect requesting foreign powers to allow the bearer to enter and to pass freely and safely." *United States* v. *Laub*, 385 U.S. 475, 481 (1967). See *e.g.*, *Kent* v. *Dulles*, *supra*, 357 U.S. at 120-121; *Urtetiqui* v. *D'Arcy*, *supra*, 34 U.S.

(9 Pet.) at 399.[33] The history of passport control canvassed above and the events giving rise to this case "establis[h] that either the behavior or the predicament of an individual citizen in a foreign country can bring into clash, peaceful or violent, the powers of his own government and those of the foreign power." *Worthy* v. *Herter*, *supra*, 270 F.2d at 911. See, *e.g.*, *Zemel* v. *Rusk*, *supra*; *Perez* v. *Brownell*, 356 U.S. 44, 59 (1958); *MacEwan* v. *Rusk*, 228 F. Supp. 306, 308-312 (E.D. Pa. 1964).[34]

Because construction and application of the Passport Act implicates both a broad delegation of statutory authority and the Executive's inherent responsibilities under the Constitution, the courts "should hesitate long before limiting or embarrassing such powers." *MacKenzie* v. *Hare*, 239 U.S. 299, 311 (1915). As this Court explained in *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 589 (1952), "the conduct of foreign relations [and] the war power * * * are so exclusively entrusted to the political branches of government as to be largely immune from judicial

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[33] Each American passport states that "[t]he Secretary of State of the United States of America hereby requests all whom it may concern to permit the citizen[s]/national[s] of the United States named herein to pass without delay or hindrance and in case of need to give all lawful aid and protection." The irony of the court of appeals' decision is painfully apparent. In the court of appeals' view, the United States is required to facilitate respondent's travels and to ask for the good offices of other countries on behalf of respondent, even though respondent freely concedes that his travels are harming, and are intended to harm, this nation's security and foreign relations.

[34] For example, respondent's activities abroad have caused him to be deported from Great Britain, France, Germany, and Holland. See also note 3, *supra*.

inquiry or interference." See, *e.g.*, *Goldwater* v. *Carter*, *supra*; *Banco Nacional de Cuba* v. *Sabbatino*, *supra*, 376 U.S. at 423; *Chicago & Southern Air Lines, Inc.* v. *Waterman S.S. Corp.*, *supra*, 333 U.S. at 109-112; *United States* v. *Belmont*, 301 U.S. 324, 328 (1937); *United States* v. *Curtiss-Wright Corp.*, *supra*, 299 U.S. at 319-322. The decision of the court of appeals strays far from these principles.

As a consequence of the court of appeals' cramped construction of the Passport Act, the Executive is powerless to restrict the international travels of persons such as respondent unless that person is under indictment. To be sure, the government may deny a passport to an applicant who is "participating in illegal conduct [or] trying to escape the toils of the law * * *." *Kent* v. *Dulles*, *supra*, 357 U.S. at 127; *Zemel* v. *Rusk*, *supra*, 381 U.S. at 13. See 22 C.F.R. 51.70. But nothing in this Court's prior opinions or the history of passport control suggests either that such revocation need be predicated on the institution of formal criminal proceedings[35] or that the reasons for revocation need be limited to the applicant's criminal conduct. Indeed, the area restrictions upheld in *Zemel* were based solely on foreign policy and national security considerations without reference to the prior or future criminal intent of the passport applicant.[36]

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[35] As detailed in Judge MacKinnon's dissenting opinion in the court of appeals, respondent's activities abroad may well have violated various criminal statutes, including 18 U.S.C. 793. See Pet. App. 57a-63a, 74a-91a.

[36] In *Kent*, the Court observed that "the cases of refusal of passports generally fell into two categories * * * [:] questions pertinent to the citizenship of the applicant * * * [and] whether the applicant was participating in illegal conduct

The narrow rule adopted by the court of appeals fails to protect adequately the national security and foreign policy interests of this country. In many instances, the Executive might be unable to obtain an indictment of the passport holder until after he has actually caused serious damage to this country's vital interests. For example, respondent's future conduct with regard to the hostage situation in Iran is not an appropriate basis for a criminal prosecution at this time, even though his activities abroad might well result in substantial harm to the national security and foreign policy of the United States. Moreover, as the Court recently recognized, prosecution of a person such as respondent "would subject the CIA and its officials to probing discovery into the Agency's highly confidential affairs. * * * When the Government cannot secure its remedy without unacceptable risks, it has no remedy at all." *Snepp* v. *United States*, 444 U.S. 507, 514-515 (1980).

Equally important, the decision of the court of appeals ties the Executive's hands in circumstances in which obviously dangerous foreign travel does not and will not violate any domestic criminal provision. To cite just one example, an American citizen might seek to travel abroad, purchase a weapon there, and attempt to assassinate a foreign leader or overthrow a foreign government. The court of appeals has con-

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* * *." 357 U.S. at 127. But, as the history of passport control and the Court's decisions in *Kent* and *Zemel* make clear, that admittedly general description of prior practice is hardly exhaustive. Thus, the Court prefaced its description with the phrase "[s]o far as material here" (357 U.S. at 127), and it further stated that "[o]ne can find in the records of the State Department rulings of subordinates covering a wider range of activities than the two indicated" (*id.* at 128). See also note 12, *supra*.

cluded that the Executive is powerless to deny a passport in that situation and that therefore the Secretary must facilitate the applicant's pernicious scheme, even though the assassination attempt undoubtedly would strain our relations with that foreign government and could conceivably impel this country into armed hostilities. Congress clearly cannot have intended that absurd result (see, *e.g.*, *United States* v. *Ryan*, 284 U.S. 167, 175 (1931)), and the language and legislative history of the Passport Act described above demonstrate that it did not do so.[37]

II

THE SECRETARY'S REVOCATION OF RESPONDENT'S PASSPORT ON NATIONAL SECURITY AND FOREIGN POLICY GROUNDS DOES NOT VIOLATE RESPONDENT'S CONSTITUTIONAL RIGHTS

A. The Fifth Amendment Permits The Secretary To Impose International Travel Restrictions As A Means Of Protecting The National Security And Foreign Policy

The revocation of respondent's passport unquestionably will affect his ability to travel abroad. Unless otherwise ordered by the Executive, it is unlawful for a citizen to enter or leave this country without a valid passport. See 8 U.S.C. (Supp. II) 1185 (b).[38] Moreover, once abroad, possession of a pass-

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[37] Indeed, when this very hypothetical case was discussed in a Senate hearing in 1958, Senator Sparkman remarked that the Secretary's power to revoke a passport in that circumstance in order to protect the country's security and foreign policy interests was beyond dispute. *Passport Legislation I*, *supra*, at 37.

[38] 22 C.F.R. 53.2(b) provides that no passport is required on journeys of less than 60 days to any country in North, South, or Central America, except Cuba. In 1978, Congress deleted the criminal penalty for violating the prohibition set

port is often helpful, if not essential, to travel within and between foreign countries. See, *e.g.*, *Zemel* v. *Rusk*, *supra*, 381 U.S. at 13-14; *Aptheker* v. *Secretary of State*, 378 U.S. 500, 507 (1964); *Kent* v. *Dulles*, *supra*, 357 U.S. at 121-122. For example, we are informed that respondent's continued residence in the Federal Republic of Germany may well depend upon his possession of a valid American passport. See Auslaendergesetz art. III(1) (1965) ("Foreigners who enter the area of jurisdiction of this law, and want to reside in it, or leave it, must show a passport."). Accordingly, we do not dispute that the revocation of respondent's passport implicates his right to travel internationally, which is protected by the Fifth Amendment. See, *e.g.*, *Califano* v. *Aznavorian*, 439 U.S. 170, 175-177 (1978); *Zemel* v. *Rusk*, *supra*, 381 U.S. at 14; *Kent* v. *Dulles*, *supra*, 357 U.S. at 125.

Although respondent's right of international travel "is part of the liberty of which the citizen cannot be deprived without due process of law" (*Kent* v. *Dulles*, *supra*, 357 U.S. at 125), it is not a fundamental right, such as the right of interstate travel. See, *e.g.*, *Califano* v. *Aznavorian*, *supra*, 439 U.S. at 176-177; *Califano* v. *Torres*, 435 U.S. 1, 4 n.6 (1978). Rather, this case concerns only respondent's more limited interest in traveling abroad freely, and that interest, as the Court explained in *Zemel* v. *Rusk*, *supra*, is subject to reasonable regulation and restriction. See 381 U.S. at 14-15. The Court therefore had no difficulty concluding in *Zemel* that, pursuant to the government's interest in national security and foreign policy, the Secretary could impose limitations on the right to foreign travel. See *id.* at 13-16. See also

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forth in 8 U.S.C. (Supp. II) 1185(b). See Pub. L. No. 95-426, Section 707(d), 92 Stat. 993.

Aptheker v. *Secretary of State*, *supra*, 378 U.S. at 509; *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 159-160 (1963).

Application of these principles to this case shows that respondent's Fifth Amendment claim is insubstantial. The Secretary's regulation permits a passport to be revoked only on the basis of "*serious damage*" to the "national security or foreign policy." 22 C.F.R. 51.70(b)(4) (emphasis added). Hence, here, as in *Zemel*, the challenged regulation by definition "is supported by the weightiest considerations of national security" and "foreign policy" (381 U.S. at 16, 13). See also *Freedom to Travel*, Report of the Special Comm. to Study Passport Procedures of the Ass'n of the Bar of the City of New York, 58-62 (1958) (concluding that passports may constitutionally be denied to protect national security). Moreover, although respondent's challenge is limited to the validity of the regulation on its face, there is also no question that the Secretary's application of the regulation in this case is well warranted. Respondent's actions abroad have caused several foreign governments to expel him and even now could threaten the delicate diplomatic crisis existing between this country and Iran. See pages 5-6 & n.5, *supra*. In addition, respondent's campaign against the CIA subjects government personnel—whether or not CIA employees—to substantial risks and undermines the government's "compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service." *Snepp* v. *United States*, 444 U.S. 507, 509 n.3 (1980).[39]

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[39] Respondent's concession that he is covered by 22 C.F.R. 51.70(b)(4) vitiates any claim that the regulation is imper-

B. 22 C.F.R. 51.70(b)(4) Does Not Abridge Respondent's First Amendment Rights

For similar reasons, respondent's First Amendment claims are without merit. In light of respondent's concession that he falls within the terms of 22 C.F.R. 51.70(b)(4), the only question is whether that regulation on its face impermissibly trenches upon First Amendment rights. But that regulation focuses on dangerous *conduct* and not protected speech or associational activities. Revocation of a passport pursuant to 22 C.F.R. 51.70(b)(4) thus only indirectly affects respondent's right to speak, if at all. See *Zemel* v. *Rusk*, *supra*, 381 U.S. at 16. Indeed, as respondent pointed out in the court of appeals, "[t]he government * * * cannot stop present speech-making and writing * * * by revoking respondent's passport." Resp. Mem. In Opp. to App. for a Stay 4.

In any event, the government may constitutionally impose reasonable restrictions on conduct, including speech, that seriously harms the national security and foreign policy of the United States. As the Court remarked in *Kennedy* v. *Mendoza-Martinez*, *supra*, 372 U.S. at 160, "while the Constitution protects against invasions of individual rights, it is not a suicide pact." Thus, this Court has repeatedly sustained limitations on speech that directly and adversely affect the government's overriding interests in promoting the nation's defense and foreign relations, including its compelling interest in preventing disclosures that imperil our foreign intelligence service. See, *e.g.*, *Snepp* v. *United States*, *supra*, 444 U.S. at 509 n.3; *Brown* v. *Glines*, 444 U.S. 348, 354-358 (1980); *United States* v. *O'Brien*, 391 U.S. 367,

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missibly vague. See *Parker* v. *Levy*, 417 U.S. 733, 755-756 (1974).

376 (1968); *Zemel* v. *Rusk*, *supra*, 381 U.S. at 16-17. Because 22 C.F.R. 51.70(b)(4) is directly related to these compelling societal interests, those cases are controlling here.

Finally, the regulation is not overbroad. It is a neutral and noncensorial provision carefully tailored to prevent "activities abroad" that cause "serious" harm to the nation's security and foreign relations. Moreover, as the history of passport control shows, 22 C.F.R. 51.70(b)(4) and its predecessors have been both narrowly construed and sparingly applied primarily to cases of harmful conduct not involving protected speech at all.[40] See pages 24, 26-30, 36-40, *supra*.[41] Because the national security and foreign policy regulation thus "covers a whole range of easily identifiable and constitutionality proscribable * * * conduct," it is not facially invalid. *Civil Service Commission* v. *Letter Carriers*, 413 U.S. 548, 581 (1973). Accord, *Parker* v. *Levy*, 417 U.S. 733, 760-761 (1974); *Broadrick* v. *Oklahoma*, 413 U.S. 601, 613-615 (1973). Insofar as the regulation could conceivably be applied to constitutionally protected conduct, that problem "should be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied." *Broadrick* v. *Oklahoma*, *supra*, 413 U.S. at 615-616.

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[40] The initial determination to deny or revoke a passport is made by the Secretary of State personally. Following an administrative hearing and further administrative review (see 22 C.F.R. 51.80-51.89 and 7.1-7.11), the revocation or denial is subject to judicial review. See, *e.g.*, *Kraus* v. *Dulles*, 235 F.2d 840 (D.C. Cir. 1956). Here, respondent waived his right to an administrative hearing and review.

[41] The revocation of passports condemned in *Kent* was effected pursuant to a separate regulation solely concerning Communists. See 357 U.S. at 117-118 & n.1.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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